Supreme Court, U.S.
FILED
JUN 7 1995
OFFICE OF THE CLERK

(2)

No. 94-1858

In The

Supreme Court of the United States

October Term 1994

ANNA TWINS SPOTTEDWOLF, et al.,

Petitioners,

versus

WOODS PETROLEUM CORPORATION, et al.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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June 8, 1995

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QUESTIONS PRESENTED FOR REVIEW

The narrow question presented by Petitioners is whether, under the Administrative Procedure Act, 5 U.S.C. §§ 701-706, the Court of Appeals for the Tenth Circuit properly found, under the specific facts presented, that the United States Secretary of the Interior (the "Secretary"), acted in an arbitrary manner and abused his discretion when: (1) in 1986, he ignored his own published guidelines and rejected a proper plan of communitized mineral development approved in 1982, admittedly for the sole purpose of causing existing Indian mineral leases to terminate so that the Indian Petitioners could enter into new, more lucrative leases, and (2) then immediately approved essentially identical communitization for a new lessee, determining that communitization was, in fact, proper in 1982.

The Secretary has not sought certiorari and presents no questions for review.

RESPONDENT PARTIES TO THE PROCEEDING

Woods Petroleum Corporation has been renamed Argent Energy Company. Its parent company is Sunshine Mining Company. There are no subsidiary companies.

Ratex Resources Incorporated has merged into Frontier Acquisition Corp., whose parent company is Frontier Natural Gas Corp.

Midcon Central Exploration Company's interests have been acquired by Apache Corporation.

Mustang Production Company has merged into its parent company, Mustang Fuels Company.

TABLE OF CONTENTS

QUESTIONS PRESENT FOR REVIEW i

RESPONDENT PARTIES TO THE PROCEEDING ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES v

OPINIONS BELOW 2

STATEMENT OF JURISDICTION 2

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 2

STATEMENT OF THE CASE 3

I. INTRODUCTION 3

II. SUMMARY OF FACTS 4

REASONS FOR DENYING THE WRIT 8

I. NO SPECIAL OR IMPORTANT ISSUES ARE PRESENTED 9

II. THE COURT OF APPEALS APPLIED THE CORRECT LEGAL STANDARDS 10

A. Scope of Judicial Review 10
B. The Secretary's Duty To The Indian Petitioners 12
C. Remand Was Not Necessary 13

III. THE COURT OF APPEALS PROPERLY FOUND THE SECRETARY'S ACTIONS TO BE ARBITRARY AND CAPRICIOUS 15

A. The Secretary Failed to Follow His Own Guidelines 15
B. The Secretary's Rulings Were Irreconcilably Inconsistent 19

IV. THE COURT OF APPEALS CORRECTLY HELD THAT THE SECRETARY'S FIDUCIARY DUTY TO THE INDIAN PETITIONERS DOES NOT ALLOW THE SECRETARY TO IGNORE THE PROPERTY RIGHTS OF OTHERS 20

V. THE HENRY DISSENT 22

A. Limits on Fiduciary Duty Issue 23
B. The Intra-Circuit Conflict Issue 24
C. The "Inconsistent" Decisions Issue 25

CONCLUSION 28

TABLE OF AUTHORITIES

CASES

Baltimore & Ohio R.R. v. Aberdeen & Rockfish R.R., 393 U.S. 87, 89 S. Ct. 280, 21 L. Ed. 2d 219 (1968) 23

Bowman Transportation, Inc. v. Arkansas-Best Freight System, Inc., 419 U.S. 281, 95 S. Ct. 438, 42 L. Ed. 2d 447 (1974), reh'd denied., 420 U.S. 956, 95 S. Ct. 1340, 43 L. Ed. 2d 433 (1975)..... 11, 23

Budd v. Ethyl Corp., 251 Ark. 639, 474 S.W.2d 411 (1971) 27

Burlington Truck Lines, Inc. v. U.S., 371 U.S. 156, 83 S. Ct. 239 9 L. Ed. 2d 207 (1962) 11, 28

Byron v. Heckler, 742 F.2d 1232 (10th Cir. 1984) 14

California Co. v. Britt, 247 Miss. 718, 154 So. 2d 144 (1963) 27

Chevron, U.S.A., Inc. v. National Resources Defense Counsel, Inc., 467 U.S. 837, 104 S. Ct. 2778, 81 L. Ed. 2d 694 reh'g denied, 468 U.S. 1227, 105 S. Ct. 28, 82 L. Ed. 2d 921 (1984) 16

Cheyenne Arapaho Tribes of Oklahoma v. United States, 966 F.2d 583 (10th Cir. 1992), cert. denied, ___ U.S. ___, 113 S. Ct. 1642, 123 L. Ed. 2d 265 (1993) 9, 24, 25

Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, 91 S. Ct. 814, 28 L. Ed. 2d 136 (1971) 11, 23

Columbia Broadcasting Sys., Inc., v. F.C.C., 454 F. 2d 1018 (D.C. Cir. 1971)..... 11, 23

Connolly v. Pension Benefit Guar. Corp., 475 U.S. 211, 106 S. Ct. 1018, 89 L. Ed. 2d 166 (1986)..... 22

Coomes v. Adkinson, 414 F. Supp. 975 (D.S.D. 1976) 21

Cotton Petroleum Corp. v. United States,
870 F. 2d 1515 (10th Cir. 1989) ..... passim

Dunlop v. Bachowski, 421 U.S. 560, 95 S. Ct. 1951,
44 L. Ed. 2d 377 (1975) 23

Graphic Communications Int'l Union v. Salem-Gravure
Div. of World Color Press, Inc., 843 F.2d 1490
(D.C. Cir. 1988), cert. denied, 489 U.S. 1011,
109 S. Ct. 1119, 103 L. Ed. 2d 182 (1989) 18

Green Country Mobilphone, Inc. v. F.C.C., 765 F.2d 235
(D.C. Cir. 1985) 18

Hunt Oil Co. v. Moore, 656 S.W.2d 634
(Tex. Civ. App. 1983) 27

Jicarilla Apache Tribe v. Supron Energy Corp., 728 F. 2d
2d 1555 (10th Cir. 1984), on reh'g, 782 F.2d 855
(10th Cir.), modified, 793 F.2d 1171 (10th Cir.),
cert. denied, 479 U.S. 970, 107 S. Ct. 471,
93 L. Ed. 2d 416 (1986) 12, 23

Kenai Oil and Gas, Inc. v. Department of the Interior,
671 F.2d 383 (10th Cir. 1982) ..... passim

Kleppe v. Delta Mining, Inc., 423 U.S. 403,
96 S. Ct. 1851, 44 L. Ed. 2d 591 (1976) 23

Motor Vehicle Manufacturers Ass'n v. State Farm Mut.
Ins. Co., 463 U.S. 29, 103 S. Ct. 2856,
77 L. Ed. 2d 443 (1983) 11

NLRB v. Wyman-Gordon Co., 394 U.S. 759, 89 S. Ct.
1426, 22 L. Ed. 2d 709 (1969) 13

Phillips Pet. Co. v. Peterson, 218 F.2d 926 (10th Cir. 1954),
cert. denied, 349 U.S. 947, 75 S. Ct. 871,
99 L. Ed. 1273 (1955) 15

SEC v. Chenery Corp., 332 U.S. 194, 67 S. Ct. 1575, 91 L. Ed. 1995 (1947) 23

Sessions Inc. v. Morton, 348 F. Supp. 694 (C.D. Cal. 1972), aff'd, 491 F.2d 854 (9th Cir. 1974) 21

Simmons v. Block, 782 F.2d 1545 (11th Cir. 1986) 18

Superior Oil Co. v. Roberts, 398 S.W.2d 276 (Tex. 1966) 27

Tide Water Associated Oil Co. v. Stott, 159 F.2d 174 (5th Cir. 1946), cert. denied, 331 U.S. 817, 67 S. Ct. 1306, 91 L. Ed. 1835 (1947) 27

Train v. City of New York, 420 U.S. 35, 95 S. Ct. 839, 43 L. Ed. 2d 1 (1975) 11, 18

United Nuclear Corp. v. United States, 912 F.2d 1432 (Fed. Cir. 1990) 13, 21

United States v. Chicago, M., St. P. & P. R.R., 294 U.S. 499, 55 S. Ct. 462, 79 L. Ed. 1023 (1935) 23

United States v. Hardesty, 958 F.2d 910 (9th Cir. 1992), cert. denied, _____U.S._____, 113 S. Ct. 1429, 122 L. Ed. 2d797 (1993) 25

United States v. Heffner, 420 F.2d 809 (4th Cir. 1969) 18

Vista Hill Foundation, Inc. v. Heckler, 767 F.2d 556 (9th Cir. 1985) 19

Volkswagenwerk Aktiengesellschaft v. F.M.C., 390 U.S. 261, 88 S. Ct. 929, 19 L. Ed. 2d 1090 (1968) 11

Wisniewski v. United States, 353 U.S. 901, 77 S. Ct. 633, 1 L. Ed. 2d 658 (1957) 9

Woods Petroleum Corp. v. Department of the Interior, 18 F.3d 854 (10th Cir. 1994), rehearing en banc, 47 F.3d 1032 (10th Cir. 1995) ..... passim

Woods Petroleum Corp. v. Cheyenne-Arapaho Tribes of Oklahoma, ____ U.S. ____, 113 S. Ct. 1642, 123 L. Ed. 2d 265 (1993) 25

STATUTES

5 U.S.C. § 701-706 2
5 U.S.C. § 706(2)(A) 12
25 U.S.C. § 396 2
28 U.S.C. § 1254(1) 2

25 C.F.R. § 212.24(c) 3, 27
56 Fed. Reg. 58 741 (Nov. 21, 1991) 10

Fed. R. App. P. 35(a) 25

MISCELLANEOUS

Williams & Meyers, Law of Oil and Gas (1995) 4

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RESPONDENTS' BRIEF IN OPPOSITION

Appellants, Woods Petroleum Corporation (now Argent Energy Company) ("Woods"), Ratex Resources Incorporated, MidCon Central Exploration Company and Mustang Production Company (now Mustang Fuel Corporation) (collectively "Respondents"), respectfully submit this Brief In Opposition to the Petition For Writ Of Certiorari filed by Anna Twins Spottedwolf, Eleanor Stoneroad, Victor Stoneroad and Leroy

Stoneroad (the "Individual Indian Petitioners") and Tomlinson Properties, Inc. ("Tomlinson") (collectively "Petitioners").

OPINIONS BELOW

This action was taken on appeal to the Court of Appeals for the Tenth Circuit from an order of the Honorable Wayne E. Alley, United States District Judge for the Western District of Oklahoma, granting summary judgment in favor of Petitioners. This decision was reversed by a three-judge panel of the Court of Appeals in an opinion published at 18 F.3d 854 (10th Cir. 1994). Petitioners and the Secretary sought rehearing en banc, which was granted by the Court of Appeals. On rehearing en banc, an eight-judge majority also reversed the District Court's ruling in an opinion published at 47 F.3d 1032 (10th Cir. 1995).

STATEMENT OF JURISDICTION

Respondents concur with Petitioners' Statement of Jurisdiction to the extent that it properly identifies 28 U.S.C. § 1254(1) as the jurisdictional basis for this Court's review of Petitioners' Petition.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Respondents believe that this action brings into consideration the following:

Constitution of the United States of America, Amendment V; The Administrative Procedure Act, 5 U.S.C. §§ 701-706; and The Indian Mineral Leasing Act of 1938, 25 U.S.C. § 396.

STATEMENT OF THE CASE

I.
INTRODUCTION

As a circuit embracing a substantial number of American Indian tribes, Indian reservations, and federally supervised Indian property interests, the Tenth Circuit has long been mindful of the balance between the Secretary's fiduciary duties to protect the interests of his Indian wards and the rights of non-Indians who have a business relationship with Indian interests. Here, however, the Court of Appeals was not called upon to adjust this balance. Rather, the Court of Appeals was called upon either to condone or condemn Secretarial actions that manipulated the administrative process solely to achieve an otherwise unattainable economic windfall for the Indian Petitioners.

The Court of Appeals for the Tenth Circuit chose not only to review this matter at the three-judge panel level, but also to sit en banc in order to give full consideration to the facts presented. That en banc consideration resulted in a detailed examination of the law in this substantive area, a review of the specific facts in this action, and a reconciliation of the Court of Appeals' prior decisions on communitization.[1/]

1/ In order to accomplish the orderly exploration and production of oil and gas, federal and state authorities have imposed the concept of communitized operations. Communitization occurs when administrative orders join contiguous mineral and leasehold interests into a unit for the drilling of a single well and for the proportionate sharing of the costs of, and production from, the unit well drilled. As a result of communitization, all mineral leases within a unit are "held by production" from the unit well. When this communitization includes mineral interests owned by protected American Indians, federal approval of the plan of communitized development is required. The authority to determine if communitized development is proper is congressionally conferred exclusively upon the Secretary and his delegees. In this case, the Secretary's authority emanates from 25 C.F.R. § 212.24(c).

On review en banc, eight of the ten sitting judges of the Court of Appeals held that, under the narrow facts presented, the Secretary had acted in an arbitrary manner and abused his discretion when he rejected an admittedly proper plan of communitized mineral development for the sole purpose of causing existing Indian mineral leases to terminate, and then immediately approved identical communitization, retroactive to the same time period, as "in the best interests" of the Indian lessors--after the payment of another lease bonus.[2/]

The en banc review and decision by the Court of Appeals were fact specific, correctly applied the prior teachings of this Court, and were expressly found to be consistent with other decisions of the Tenth Circuit. There is, thus, no foundation upon which to base Petitioners' request for a Writ of Certiorari from this Court.

II.
SUMMARY OF FACTS

Petitioners rely on the "Finding of Facts" articulated by the District Court below in ruling on summary judgment. Petition for a Writ of Certiorari at 4. These findings of fact fail to fully set forth the background and circumstances that surrounded the Secretary's refusal to follow his own published guidelines and the findings of his technical and legal staffs, in arbitrarily refusing to approve admittedly proper communitized development. Further, the District Court's recitation of facts does not consider the findings and analysis of the three-judge panel of the Court of Appeals for the Tenth Circuit, (Woods, 18 F.3d 854 (10th Cir.

2/ As consideration for the grant of an oil and gas lease, a lessee typically agrees to pay an initial payment or "lease bonus," usually on a "per acre" basis, plus a "royalty" stated as a percentage of the value of the minerals extracted. See generally 8 William & Meyers, Law of Oil and Gas at 103-4 (1995).

1994)), or the Court's findings and analysis en banc. (Woods, 47 F.3d 1032 (10th Cir. 1995)). A more complete recitation of the facts of this action is set forth by the opinion of the Court of Appeals en banc and is adopted here by Respondents.

In summary, the relevant facts are as follows:

Woods was the lessee of mineral interests owned by the individual Indian Petitioners comprising 117.5 net mineral acres. The lease of these minerals was duly reviewed and expressly approved by the Secretary (the "Woods Leases"). These 117.5 net mineral acres comprised only a small fraction of the mineral interests included in a 640-acre drilling and spacing unit duly approved by the State of Oklahoma through the Oklahoma Corporation Commission.[3/]

After obtaining approval from the Oklahoma Corporation Commission, Woods timely commenced the drilling of a unit well on a non-Indian tract within the unit. Woods, along with all the other working interest owners in the unit, then timely sought approval by the Secretary of a communitization agreement (the "Communitization Agreement").[4/]

In a multi-level process, the Communitization Agreement was reviewed and approved by the Concho Agency

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3/ This acreage represents approximately 18% of the 640-acre drilling and spacing unit. The remaining 82% of the unit is comprised of non-Indian mineral interests.

4/ Petitioners' attempts to characterize the timing of Woods' activities in a pejorative light (see, e.g., Petition for a Writ of Certiorari at 5-6) are baseless. Woods' drilling activities, and its submission of documents to the Secretary, were all in full compliance with the terms of the Woods' Leases and the applicable federal regulations. See Woods Petroleum Corp. v. Deptartment of Interior, 47 F.3d 1032, 1040-41 n.9 (10th Cir. 1995).

Superintendent and by the Anadarko Area Director.[5/] Thereafter, a "Kenai[6/] best interest assessment" was conducted by the Department of the Interior - Bureau of Indian Affairs (the "BIA") in order to determine if the proposed communitization was in the Indian Petitioners' best interests. After concluding that it was, the BIA also approved the Communitization Agreement. In this assessment, the BIA advised the Secretary: (1) that a reversal of the Area Director's approval of the Communitization Agreement would constitute rejection of the unit created by the Oklahoma Corporation Commission's spacing order; (2) that a rejection of the drilling and spacing unit would result in a loss to the Indian-lessors of escrowed royalties, which amounted to nearly $385,000 as of March 1, 1986; (3) that "there is substantial risk that the Indian mineral owners may not receive any future royalties if [a new] lessee is unable to independently develop the tract[s];" and (4) that the prospects of developing the scattered undivided one-half Indian interests in an "unorthodox spacing pattern" were very poor. Court of Appeals Aplt. App. at 114. The Indian Petitioners objected to this approval but raised no objection to communitized development.

5/ During this review, a Department of Interior - Division of Energy and Mineral Resources, Realty Specialist reported:

> There appear to be no technical questions to address [regarding the propriety of communitization] as the completion of a well in September 1982 and another well as currently permitted seems to indicate the soundness of the Acting Area Director's decision to approve the [Communitization Agreement].

Court of Appeals Aplt. App. at 97.

6/ This test and the Secretary's guidelines were developed in direct response to the Court of Appeals decision in Kenai Oil and Gas, Inc. v. Department of Interior, 671 F.2d 383 (10th Cir. 1982). The purpose of the guidelines was to give direction and certainly to the communitization approval process by identifying the relevant factors to be considered.

The Secretary then ignored the BIA, his own technical and legal staffs,[7] as well as his own published guidelines, and rejected communitization as proposed by the Communitization Agreement, finding, without explanation, that it was not in the best interests of the Indian Petitioners "to have been included in the communitized area." Court of Appeals Aplt. App. at 133-34. The Secretary's rationale was that if communitization was rejected, the Woods Leases would terminate, allowing the Indian Petitioners to re-lease their minerals and obtain another lease bonus while still retaining revenues from the time of first production under the now-terminated Woods Leases.[8]

After rejecting the Communitization Agreement, the Indian Petitioners immediately granted new leases (avoiding the competitive bidding process) to Petitioner Tomlinson. The Secretary then approved an identical plan of communitization presented by the Indian Petitioners and their new lessee, Petitioner Tomlinson. This new plan of communitization included the same terms, covered the same lands, and was even retroactive to the same time (1982) as had already been proposed for communitization by Woods. The result was to include the Indian interests in the exact plan of communitization that the Secretary had earlier rejected, and to make the sharing of revenues retroactive to the time of first unit production -- four years earlier.

7/ The Department of Interior's Field Solicitor advised the Secretary that: "approval is indispensable to effectuate the intention of the parties at the time of contracting." Exhibit "B" to Woods' Brief in Chief to the Court of Appeals.

8/ Because the unit wells were not actually drilled on the Indian Petitioners' leases, the Indian leases could only be continued if communitization was approved, thereby attributing a portion of all oil and gas production in the unit to the Indian Petitioners' leases. Based on the small and scattered acreage interests of the Indian Petitioners, this communitized development, and not drilling on individual Indian leases, was all that could ever have been reasonably contemplated when the leases were issued.

REASONS FOR DENYING THE WRIT

Petitioners assert that a grant of their Petition is proper because the ruling of the Court of Appeals below "has decided important questions of federal law . . . which conflict with applicable decisions of this Court." Petition for a Writ of Certiorari at 10.[2/] This conclusion is both factually and legally insupportable.

First, the Court of Appeals acknowledged and properly applied the legal standards set forth by this Court for the review of administrative actions. Moreover, the Court of Appeals painstakingly reviewed and harmonized the applicable law in that Circuit.

Second, the Court of Appeals decision was a fact-specific determination of arbitrary conduct and an abuse of discretion on the part of the Secretary that is not a likely subject of repetition. In fact, in order to prevent duplication, the Secretary has issued proposed regulatory changes designed to guide his future actions.

Finally, the en banc opinion below properly determined, on the facts presented, that the Secretary had acted in an arbitrary manner and had abused his discretion, all contrary to law. There is, thus, no basis upon which Petitioners are entitled to the requested writ.

2/ Petitioners, however, fail to specifically identify any such decisions from this Court. The wholesale adoption by Petitioners of the dissenting opinion of the Honorable Judge Henry of the Court of Appeals does not cure this fatal defect. This device deprives both this Court and Respondents of the benefit not only of the conciseness required by Sup. Ct. Rule 14, but more importantly, of the identification of those arguments and authorities upon which Petitioners rely. This alone suggests the propriety of dismissal pursuant to Sup. Ct. Rule 14(j).5. Moreover, in dissent, Judge Henry argues only that the dissent would have, on the specific facts before it, struck a different balance between the interests of the Secretary and Respondents.

I.
NO SPECIAL OR IMPORTANT REASONS ARE PRESENT

Rule 10.1 of the Rules of the Supreme Court advises of the "special and important reasons" that may justify issuance of a writ of certiorari.[10/] No such reasons exist here.

Here, Petitioners do not claim there to be any conflict among the courts of appeals,[11/] or that there exists any conflict between the ruling below and any ruling of the courts of the State of Oklahoma. The decision below merely applied settled law to a specific set of facts and, therefore, does not merit plenary review.

10/ Rule 10.1 states in part:

> A review on writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ will be granted only when there are special and important reasons therefor. The following . . . indicate the character of reasons that will be considered:
>
> > When a United States court of appeal has rendered a decision in conflict with the decision of another United States court of appeals on the same matter; or has decided a federal question in a way in conflict with a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision.

Id. The policy of this Rule, i.e., the conservation of scarce judicial resources, places a heavy burden on a petitioner to define and demonstrate a substantial basis for certiorari. This requirement protects the certiorari process from becoming nothing more than another level of federal appeal as of right.

11/ Petitioners' implication that there exists some intra-circuit conflict among the Court of Appeals' opinions in Kenai, 671 F.2d 383 (10th Cir. 1982); Cotton Petroleum Corp. v. United States, 870 F.2d 1515 (10th Cir. 1989); Cheyenne Arapaho Tribes of Oklahoma v. United States, 966 F.2d 583 (10th Cir. 1992), cert. denied, ___ U.S. ___, 113 S. Ct. 1642 123 L. Ed. 2d 265 (1993); and Woods, similarly provides no basis for certiorari. This Court has routinely allowed conflicts among different panels of a court of appeals to be resolved by that court. See Wisniewski v. United States, 353 U.S. 901, 77 S. Ct. 633, 1 L. Ed.2d 658 (1957). More importantly, however, is that the existence of a conflict was directly addressed by the Court of Appeals and reconciled by its majority, en banc. Woods, 47 F.3d at 1038-40.

The actions of the Secretary giving rise to this litigation were fact specific and not likely to be repeated. The economic conditions, geological, engineering and lease factors presented to the Secretary in 1982 were unique. Moreover, in 1991, the Secretary proposed regulations further defining the process for the submission, review and approval of communitization agreements. See 56 Fed. Reg. 58,741 (Nov. 21, 1991) (proposing new regulations to be found in 25 C.F.R. § 211.28 captioned: "Unitization and Communitization agreement, and well spacing for oil, gas and geothermal resources.") Insofar as they pertain to communitization, these proposed regulations, while not yet final, would give guidance on some of the very issues raised in this action.[12/] There, thus, exists no "special or important reasons" for review by this Court and the Petition should be denied.

II.
THE COURT OF APPEALS APPLIED THE CORRECT LEGAL STANDARDS

The two guiding legal principles applicable in this action have always been: (1) the authority of the judiciary to review and reject improper administrative actions, and (2) the obligation of the Secretary to act, within the law, for the best interests of his Indian wards. In its en banc review, the Court of Appeals duly acknowledged, and gave deference to, each of these legal standards.

A. Scope Of Judicial Review.

It is the settled law of this Court that, where an

12/ It is through the rulemaking process that any modification of communitization approval policies, as interpreted by the Court of Appeals, should be addressed.

administrative agency has exceeded its authority or failed to follow the applicable requirements of agency regulations, judicial intervention is appropriate. Train v. City of New York, 420 U.S. 35, 95 S. Ct. 839, 43 L. Ed. 2d 1 (1975); Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, 91 S. Ct. 814, 28 L. Ed. 2d 136 (1971). Equally well settled by this Court is the concept that administrative powers are not boundless and "unless administrative action is tempered by judicial supervision, 'expertise, the strength of modern government, can become a monster which rules with no practical limits on its discretion.'" Columbia Broadcasting Sys., Inc., v. F.C.C., 454 F.2d 1018 (D.C. Cir. 1971) (quoting Burlington Truck Lines, Inc. v. United States, 371 U.S. 156, 167, 83 S. Ct. 239, 9 L. Ed. 2d 207 (1962)). See Volkswagenwerk Aktiengesellschaft v. F.M.C., 390 U.S. 261, 272, 88 S. Ct. 929, 19 L. Ed. 2d 1090 (1968).

In determining whether administrative actions are proper, this Court has advised:

> Normally, an agency rule would be arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.

Motor Vehicle Manufacturers' Ass'n v. State Farm Mut. Ins. Co., 463 U.S. 29, 43, 103 S. Ct. 2856, 77 L. Ed. 2d 443 (1983). See Bowman Transportation, Inc. v. Arkansas-Best Freight System, Inc., 419 U.S. 281, 285, 95 S. Ct. 438, 42 L. Ed. 2d 447 (1974),

reh'd den. 420 U.S. 956, 95 S. Ct. 1340, 43 L. Ed. 2d 433 (1975). In reviewing the Secretary's actions here, the Court of Appeals duly acknowledged this limited scope of its review, stating:

> Under the Administrative Procedure Act, we may set aside an agency decision that is "Arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law." 5 U.S.C. § 706(2)(A); Cotton Petroleum, 870 F.2d at 1525. An agency decision may be arbitrary and capricious if it fails to consider important relevant factors. Motor Vehicle Mfrs. Ass'n; . . . Cotton Petroleum, 870 F.2d at 1525-26. Alternatively, the decision is arbitrary and capricious if there is no "rational connection between the facts found and the choice made." Bowman Transp., Inc. . . .

Woods, 47 F.3d at 1037. It was under this limited scope of review that the Court of Appeals found, on the specific facts before it, that the Secretary "acted arbitrarily and abused his discretion." Id. at 1041. Thus, the Court of Appeals conducted a proper review of the Secretary's actions in this case. Petitioners' actual complaint, that they disagree with the Court of Appeals' application of the proper legal standard to the facts here, provides no basis for a grant of certiorari.

B. The Secretary's Duty To The Indian Petitioners.

Citing Jicarilla Apache Tribe v. Supron Energy Corp., 728 F.2d 1555 (10th Cir. 1984), on reh'g, 782 F.2d 855 (10th Cir.) (en banc) modified, 793 F.2d 1171 (10th Cir.), cert. denied, 479

U.S. 970, 107 S. Ct. 471, 93 L. Ed. 2d 416 (1986), Petitioners claim that the Court of Appeals has "exalt[ed] the regulator role of the Secretary of the Interior over his fiduciary duty to Indian mineral owners." Petition for a Writ of Certiorari at i. Petitioners' assertions notwithstanding, the Court of Appeals expressly acknowledged that one of the legal principles guiding the Secretary is to "act as the Indians fiduciary and...represent the Indians' best interests." Woods, 47 F.3d at 1038. The Court of Appeals has, however, properly acknowledged the limitation on this duty that Petitioners have sought to ignore:

> Yet, as with any trustee-beneficiary relationship, the Secretary's fiduciary duty to the Indians under § 396d is not boundless and cannot be exercised in a manner that exceeds or flouts the authorizing statute and regulations. When the Secretary deviates from firmly established procedures, or exceeds the limits of his fiduciary duty, we have found an abuse of discretion and have reversed the Secretary.

Id. See also Cotton, 870 F.2d at 1526; United Nuclear Corp. v. United States, 912 F.2d 1432 (Fed. Cir. 1990). Thus again, the Petitioners' desire to have obtained a different result when the proper legal standard was applied by the Court of Appeals to the facts here provides no basis for the requested writ.

C. Remand Was Not Necessary.

This Court has long advised that "judicial review of agency action [should not be converted] into a ping-pong game." NLRB v. Wyman-Gordon Co., 394 U.S. 759, 766 n. 6, 89 S. Ct. 1426, 22 L. Ed. 2d 709 (1969). Remand has specifically been found to be unnecessary where it "would be an idle and useless

formality." Id.

Here the Court of Appeals correctly found that:

> [R]emand for further explanation would be fruitless in this case because the Secretary has unequivocally explained his action as intended to facilitate the expiration of the Woods Petroleum lease and the Indians' receipt of a bonus payment from Tomlinson. With respect to the propriety of the Woods Petroleum Communization Agreement, neither the Secretary nor the Indian lessors has ever identified any deficiencies, and the Secretary's approval of the identical Tomlinson communization agreement is tantamount to an approval of the reasonableness of the Woods Petroleum communization agreement. In fact, the BIA Area Director's "best interest assessment," properly analyzed through the lens of the 1982 BIA guidelines, recommended approval of the Woods Petroleum communization agreement.

Woods, 47 F.3d at 1041.[13/] The Court of Appeals decision on the facts were, thus, in full accord with the teachings of this Court and remand was not necessary.

13/ None of the Petitioners, nor the Secretary, have ever offered, either here or below, any basis for the Secretary's rejection of communitization, other than to cause the Woods Leases to terminate. See Byron v. Heckler, 742 F.2d 1232, 1236 (10th Cir. 1984) (remand not proper "because it is highly doubtful that there would be any substantial evidence in the record [on remand] to support a finding that appellant's condition had improved to the requisite extent.").

III.
THE COURT OF APPEALS PROPERLY FOUND THE SECRETARY'S ACTIONS TO BE ARBITRARY AND CAPRICIOUS

In this action, the Court of Appeals was presented with a final order of an administrator who, in issuing that order, had: (1) failed to follow his own established guidelines, (2) failed to consider all relevant factors affecting the decision, (3) failed to demonstrate a rational connection between the evidence presented and his order, and (4) issued irreconcilably inconsistent rulings on the same question. In light of these facts, the Court of Appeals was required by the teachings of this Court to find that the administrator had acted in an arbitrary manner and had abused his discretion.

A. The Secretary Failed to Follow His Own Guidelines.

In 1982, the Court of Appeals in Kenai set out the principle of law that has governed all of its subsequent analyses of the Secretary's decisions on communitization. In Kenai, the Court of Appeals rejected a mineral lessee's claim that the Secretary "is limited to considering matters involving production and conservation on restricted Indian lands." Id., 671 F.2d at 387 (emphasis added).[14/] Instead, the Court of Appeals upheld the Secretary's authority to consider economics as a relevant factor stating:

14/ This argument was a misconstruction of the Court of Appeals' prior ruling in Phillips Pet. Co. v. Peterson, 218 F.2d 926 (10th Cir. 1954), cert. denied, 349 U.S. 947, 75 S. Ct. 871, 99 L. Ed. 1273 (1955), where the Court of Appeals opined that it was permissible for the Secretary to consider conservation factors in reviewing proposed communitization. Id.

> In light of [the Secretary's] trust responsibilities, the [Secretary] must take the Indian's best interests into account when making any decision involving leases on tribal lands and has broad discretion to consider all factors affecting their interests.

Id. The Court of Appeals cautioned, however, that economics were not the only factor to be considered, stating: "I do not believe that in considering the broad discretion [of the Secretary] we can permit [him], simply in light of his trust responsibilities to the Indians, to refuse approval of communitization agreements if he concludes that the Indian lands within the proposed unit will fare better economically 'outside.'" Id. at 388 (J. Barrett concurring).

In direct response to Kenai, the Secretary issued specific administrative guidelines for the review of communitization agreements. See Cotton, 870 F.2d at 1518.[15/] These expressly articulated factors include: (1) "the long term economic effect of the communitization agreement;" (2) "expert geologic and engineering opinions;" and (3) whether the lessee had complied with the terms of the . . . lease in all respects." Woods, 47 F.3d at 1038 (citing Cotton, 870 F.2d at 1525). In applying these guidelines, the issue before the Secretary "is whether the communitization agreement should be approved, and it is not whether the underlying leases, which, previously had been approved by the Secretary, were a good deal or a bad deal with the benefit of hindsight." Woods, 47 F.3d at 1038-39 (emphasis in original).

15/ These guidelines are the administrative interpretations by the Secretary of the factors which are relevant in assessing whether approval is in the best interests of Indian lessors, and are entitled to deference. See Chevron, U.S.A., Inc. v. National Resources Defense Counsel, Inc., 467 U.S. 837, 104 S. Ct. 2778, 81 L. Ed. 2d 694, reh'g denied, 468 U.S. 1227, 105 S. Ct. 28, 82 L. Ed. 2d 921 (1984).

The facts before the Court of Appeals, however, demonstrated that each of these relevant factors was ignored by the Secretary. Specifically:

(1) Long Term Economic Effects -- both the Area Director and the BIA found that the communitized development proposed by Woods was in the "best interest" of the Indian Petitioners. The Secretary ignored this analysis examining only the short-term economic windfall to the Indian Petitioners that could be effected if he caused the Woods Leases to terminate. This conclusion, based on creating a mechanism to allow Indian lessors to "have it both ways," has previously been held to be arbitrary and an abuse of discretion. Cotton, 870 F.2d at 1527. Morever, this action simply ignored the warnings by the Secretary's legal staff that, if the Indian leases were excluded from the unit, they would in all likelihood lose the opportunity to obtain their pro rata share of unit revenues. See Memorandum to the Area Director from Field Solicitor, Exhibit "B" to Woods' Brief in Chief in the Court of Appeals.

(2) Geologic And Engineering Data -- The Oklahoma Corporation Commission, the Department of the Interior-Mineral Management Service, and the Hydrocarbon Mineral Section of the BIA, each reviewed the geologic data and determined that communitized development was appropriate for the mutual benefit of all mineral owners as well as in the public conservation interest. Court of Appeals Aplt. App. at 37-40, 97, 114-17. The Secretary ignored this analysis as well, offering no explanation to support his conclusion that: "it is not in the best interest of the Indian mineral owners to have been included in the communitized area." Order of the Secretary, Id. at 130. This conclusion was directly contrary to the Secretary's subsequent approval of inclusion of the Indian Petitioners' new leases in the exact same communitized unit. Woods, 47 F. 3d at 1039.

(3) Wood's Compliance With Lease Terms -- Before the Secretary, it was undisputed that Woods had complied with all terms of the Woods Leases and applicable federal regulations. The Secretary, without explanation, literally "invented" requirements never before or since required of a lessee. See Woods, 47 F. at 1040-41 n.9. This creation of new and different criteria alone justified vacation of the Secretary's decision. See Graphic Communications Int'l Union v. Salem-Gravure Div. of World Color Press, Inc., 843 F.2d 1490 (D.C. Cir. 1988), cert. denied, 489 U.S. 1011, 109 S. Ct. 1119, 103 L. Ed. 2d 182 (1989); Green Country bilphone, Inc. v. F.C.C., 765 F.2d 235 (D.C. Cir. 1985).

In this regard, the Court of Appeals found:

> The Secretary found no factor intrinsic to the Woods Petroleum communitization agreement that merited disapproval. Indeed, the Secretary ignored the relevant communitization factors spelled out in the 1982 BIA guidelines, namely the long-term economic effects of the communitization agreement, the conservation and technical aspects of the agreement, and whether the lessee complied with the lease terms.

Woods, 47 F.3d at 1040. Such actions by an administrator have consistently been held, not only by this Court, but by many of the other court of appeals as well, to constitute arbitrary and capricious conduct. See Train, 420 U.S. at 48; Cotton, 870 F.2d at 1529; Simmons v. Block, 782 F.2d 1545, 1550 (11th Cir. 1986) ("The courts must overturn agency actions which do not scrupulously follow the regulations and procedures promulgated by the agency itself.")(citing United States v. Heffner, 420 F.2d

809 (4th Cir. 1969)); Vista Hill Foundation, Inc. v. Heckler, 767 F.2d 556 (9th Cir. 1985). Because the Court of Appeals correctly found that the Secretary had ignored his own published guidelines in order to reach a desired short-term economic windfall for the Indian Petitioners, its reversal of the Secretary's order was proper.

B. The Secretary's Rulings Were Irreconcilably Inconsistent.

The Court of Appeals decision reversing the Secretary was also required by the fact that, in creating a mechanism to allow the Indian Petitioners to obtain a windfall, the Secretary made irreconcilably inconsistent decisions on the same facts. In 1986, in reviewing the Communitization Agreement, the Secretary found that, as of the date of proposed communitization, 1982, such development was not "in the best interests" of the Indian Petitioners. However, immediately after triggering lease termination, the Secretary reversed this decision by inserting the Indian Petitioners' interests, now subject to leases to Petitioner Tomlinson, into an identical plan of communitized development[16/] and finding it to be "in the best interests" of the Indian Petitioners to have communitization effective starting in 1982.

Prior to this action, the Court of Appeals had advised the Secretary that such a "sometimes yes, sometimes no, sometimes maybe policy . . . cannot . . . be squared with [the court's] obligations to preclude arbitrary and capricious management of [an agency's] mandate." Cotton, 870 F.2d at 1528. Thus, it was proper for the Court of Appeals to find here that:

16/ The plan subsequently approved by the Secretary contained the same terms, covered the same lands, and was made effective retroactive to a date rior to the first production from the unit drilled by Wood. In economic effect, this plan of communitized development was identical to that proposed by Wood and summarily rejected by the Secretary.

> When the Secretary first disapproved the communitization agreement for the sole purpose of causing the underlying leases to terminate, and then immediately thereafter approved an identical communitization agreement for the new leases, it is obvious that the Secretary was not really evaluating the communitization agreement at all. Rather, he was using his power in an arbitrary way to disapprove the communitization agreement as a mere vehicle to cause the underlying leases to terminate.

Woods, 47 F.3d at 1039.

IV.
THE COURT OF APPEALS CORRECTLY HELD THAT THE SECRETARY'S FIDUCIARY DUTY TO THE INDIAN PETITIONERS DOES NOT ALLOW THE SECRETARY TO IGNORE THE PROPERTY RIGHTS OF OTHERS

Petitioners argue that the Secretary, based on his fiduciary duty, is required to ignore all other factors in favor of their short-term economic gain. If, as Petitioners contend, the Secretary must ignore the property interests of Respondents in order to fulfill his fiduciary duties, then his decision is a violation of constitutionally protected rights. Constitution of the United States of America, Amendment V.

The Court of Appeals specifically acknowledged that the Secretary and his delegates act as the Indians' fiduciary. Woods, 47 F.3d at 1038. Despite the urgings of Petitioners, however, this duty does not allow or countenance the Secretary attempting to ignore the constitutionally protected rights of non-Indians in order to create an economic windfall for his wards. Id. at 1040.

Approval of the Woods Leases vested constitutionally protected property rights in the Respondents. Coomes v. Adkinson, 414 F. Supp. 975 (D.S.D. 1976); Sessions Inc. v. Morton, 348 F. Supp. 694, 699-700 (C.D. Cal. 1972), aff'd, 491 F.2d 854 (9th Cir. 1974). See also United Nuclear Corp. v. United States, 912 F.2d 1432 (Fed. Cir. 1990). Here, the Secretary approved the Woods Leases and the property rights they conferred, and later, without lawful justification, attempted to abrogate those same rights.[17/] Such administrative action has been found to be an unconstitutional taking of property by another court of appeals as well.

In United Nuclear, plaintiff, lessee under Indian mining leases, submitted to the Secretary a mining plan which "concededly satisfied the requirements of the applicable regulations." Id. at 1436. The Indian lessors opposed the approval of the plan "either to require [the lessee] to pay more money or to cause the leases to lapse." Id. at 1434. The Secretary refused to approve the lessee's mining plan "because 'the tribe wanted more bucks, more money.'" Id. at 1435. In holding the Secretary's actions to be an unconstitutional taking of the lessee's property, the court explained:

17/ As the Court of Appeals pointed out in Cotton:

> Implicit in that approval [of the original lease] was the Secretary's approval of the parties' express promise to abide by any communitization agreement adopted for the unit and approved by the Secretary. This does not mean that the Secretary forfeited his right to examine the appropriateness of a proposed communitization agreement. It does, however, provide additional proof that the Secretary was acting arbitrarily and capriciously when he thereafter refused to approve an otherwise fair and proper communitization agreement for the sole purpose of causing the underlying lease--which the Secretary had previously approved--to expire.

Cotton, 870 F.2d at 1528 (citations omitted). See also id. at 1523 n.2.

> [The lessee] justifiably believed and expected that if its mining plan met the requirements, the Secretary would approve it. . . .
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> . . .
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> The Secretary's action reflects . . . an attempt to enable the Tribe to exact additional money from a company with whom it had a valid contract, which the government euphemistically describes as an attempt to encourage and promote Indian self-determination.

Id. at 1436-38. The same type of unconstitutional taking of Respondents' property would have resulted from the Secretary's actions here. Such actions were properly rejected by the Court of Appeals.[18]

V.
THE HENRY DISSENT

Petitioners urge the wholesale adoption of Honorable Judge Henry's dissenting opinion in the Court of Appeals. While certainly extensive, the dissent advocates unbridled administrative discretion on the part of the Secretary motivated by one consideration only--short-term economic gain. Both the law of this Court, and the specific facts of this action, make this position untenable. It was, therefore, properly rejected by the Court of Appeals.

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[18] The significant economic impact of the taking is amply demonstrated here by the amounts of funds deposited into escrow in the district court. Moreover, the Secretary's actions were demonstrably arbitrary and virtually precluded Respondents' "investment backed expectations" in the development of the Woods Leases. See Connolly v. Pension Benefit Guar. Corp., 475 U.S. 211, 106 S. Ct. 1018, 89 L. Ed. 2d 166 (1986). Thus, an unconstitutional "taking" has occurred.

Three principal issues are addressed by the dissent.[19] Respondent respectfully urge that, in each case, the dissent reached an erroneous conclusion.

A. The Limits On Fiduciary Duty Issue.

The dissent asserts that the Secretary's duty is fiduciary in nature. Woods, 47 F.3d at 1042. With this assertion the Court of Appeals expressly agreed. Id. at 1038. However, without supporting authority, the dissent then argues that this duty alone must control Secretarial decision-making.[20] The dissent further urges that this duty is to be measured by one criteria--the capture of short-term revenues. This conclusion is contradicted not only

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19/ In addition, the dissent argues that any requirement on an administrator to specifically articulate and discuss the relevant factors considered in his decision-making process is untoward. This position ignores a fully developed body of administrative law requiring an administrator to fully set forth the underlying basis for its decisions. See, e.g., United States v. Chicago, M., St. P. & P. R.R., 294 U.S. 499, 510-11, 55 S. Ct. 462, 467, 79 L. Ed. 1023 (1935) ("We must know what a decision means before the duty becomes ours to say whether it is right or wrong"); SEC v. Chenery Corp., 332 U.S. 194, 196-97, 67 S. Ct. 1575, 1577, 91 L. Ed. 1995 (1947) ("It will not do for a court to be compelled to guess at the theory underlying the agency's action . . .); Baltimore & Ohio R.R. v. Aberdeen & Rockfish R.R., 393 U.S. 87, 92, 89 S. Ct. 280, 21 L. Ed. 2d 219 (1968); Citizens to Preserve Overton Park, 401 U.S. at 420; Bowman Transportation, Inc., 419 U.S. at 285-86; Dunlop v. Bachowski, 421 U.S. 560, 571-72, 573-74, 95 S. Ct. 1951, 44 L. Ed. 2d 377 (1975); Kleppe v. Delta Mining, Inc., 423 U.S. 403, 409, 96 S. Ct. 1851, 44 L. Ed. 2d 591 (1976); Columbia Broadcasting System, Inc. v. F.C.C., 454 F.2d 1018, 1029 (D.C. Cir. 1971) ("[the administrator] must explain its reasons and do more than enumerate factual differences, if any between ... similar cases; it must explain those differences to the purposes of the . . . Act.").

20/ Even the authority noted by the dissent does not support its view. Jicarilla, cited by the dissent, requires only that if "there is more than one 'reasonable' choice . . . [the Secretary] must choose the alternative that is in the best interests of the Indian tribe." 728 F.2d at 1567 (emphasis added). What the dissent urges is that any choice which results in economic gain to the Indians--even if it violates protected property rights and violates numerous precepts of law--is "reasonable." Woods, 47 F.3d at 1043. There is no legal support for this position.

by the eight-judge majority of the Court of Appeals in this action, but its prior reviews of Secretarial actions (see Kenai) and by the Secretary's own internal administrative interpretations as well.[21/]

If, as the dissent urges, there are no limits to the Secretary's discretion, if the sole criteria determining Secretarial decisions is merely what puts more money today in the Indian Petitioners' pockets, then Secretarial approval of the issuance of every Indian lease and every communitization agreement is merely illusory--subject only to the appearance of the next higher bidder. Such a rationale is legally insupportable and was properly rejected by the majority of the Court of Appeals.

B. The Intra-Circuit Conflict Issue.

The dissent argues that the Court of Appeals has, by its opinion here, created an intra-circuit conflict with its prior rulings in Kenai and Cheyenne-Arapaho.[22/] Id. at 1044. This argument, Respondents respectfully suggest, is without substance and provides no basis for review.

First, the existence of such a conflict was specifically raised by Petitioners and the Secretary in requesting rehearing en banc before the Court of Appeals. That full Court expressly undertook to review this issue. Woods, 47 F.3d at 1039. After revisiting each of its prior panel decisions, the eight-judge majority, for the entire Court of Appeals, painstakingly reconciled

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21/ The Department of Interior has interpreted its guidelines stating: "There may be times when spacing is not in the best interest of an particular individual in the short term; but the determination to communitize must be based upon the long-term overall conditions of the reservoir." See Cotton, 870 F.2d at 1519.

22/ As for the fourth Secretarial review opinion from the Court of Appeals, Cotton, (having facts virtually identical to those here) the dissent summarily dismisses its applicability. Woods, 47 F.3d at 1046.

their analyses in the four communitization cases claimed as the bases for the conflict. Id. Thus, to the extent that any tension did exist between the rulings of various panels of the Court of Appeals, that tension was resolved by the imprimatur of the entire Court in Woods. See Fed. R. App. P. 35(a); United States v. Hardesty, 958 F.2d 910, 912 (9th Cir. 1992), cert. denied, ____U.S. ____, 113 S. Ct. 1429, 122 L.Ed.2d 797 (1993).

The dissent, again without supporting authority, chooses to disagree with the majority. This choice, however, does not change the fact that no conflict exists, and that the Court of Appeals' opinions are consistent.[23/]

C. The "Inconsistent" Decisions Issue.

The dissent urges that it is perfectly reasonable for the Secretary to reject communitization and then immediately thereafter reverse himself, and approve identical communitization. This position was properly rejected by the Court of Appeals.

23/ Not only did the Court of Appeals reconcile these opinions in issuing its opinion here, but it took a prior similar opportunity to harmonize its analyses in Cheyenne-Arapaho as well, stating:

> [The lessee's] claim is consistent with Cotton, in which we refused to defer to the Secretary's decision since he considered only economic factors, rather that all relevant factors. . . This is not a Cotton situation, however . . . . As per Kenai, our opinion is that those economic factors were indeed relevant and should have been considered . . . . In Kenai, we deferred to the Secretary's decision because he considered economic, conservation and production factors . . . . However, in the case at bar, as in Cotton, we cannot defer since the Secretary did not consider all relevant factors.

966 F. 2d at 591 n.14 (citations omitted). Certiorari on this issue was declined by this Court. Woods Petroleum Corp. v. Cheyenne-Arapaho Tribes of Oklahoma, ___ U.S. ___ 113 S. Ct. 1642, 123 L. Ed. 2d 265 (1993).

In Cotton, the Secretary disapproved communitization of the production unit to the extent that it would result in termination of the existing Indian lease, but approved inclusion of the Indian tract in the same unit as an unleased tract once his initial disapproval had the intended effect of triggering lease termination. Cotton, 870 F.2d at 1527. Here, once again, the Secretary initially rejected communitized development but subsequently reversed that decision, after triggering lease termination, by including new Indian leases acquired by Petitioner Tomlinson in a virtually identical plan of communitized development.[24/]

The Court of Appeals, both in Cotton and here, was rightly concerned over the irreconcilability of the Secretary's decisions first rejecting, and then approving, identical communitized operations.[25/] In Cotton, the Court of Appeals stated: "To reject the communitization agreement and then immediately to affirm it and to award the Rose Appellees retroactive benefits under it exposes the arbitrary and capricious nature of the Secretary's

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24/ The plan subsequently approved by the Secretary covered the same lands and was made effective retroactive to a date prior to first production from the unit from the well drilled by Woods. In economic effect, this plan of development was identical to that proposed by Woods and summarily rejected by the Secretary.

25/ Petitioners have argued that just such a result is endorsed in Kenai. This conclusion ignores the Court of Appeals' limiting analysis of Kenai in Cotton:

> [In Kenai] the Secretary . . . was not taking inconsistent positions as to whether the Indian lessor was in or out of the communitization unit. Rather, the Secretary in Kenai refused to approve the communitization agreement for any purpose. We were not faced [in Kenai] with a situation where the Secretary was seeking simultaneously to free the Indian lessor from the burdens of the communitization agreement while retaining for the Indians its benefits.

Cotton, 870 F.2d at 1528 n.4.

action." Cotton, 870 F.2d at 1527.[26] Here too, the Court of Appeals specifically found the purpose of the Secretary's actions not to constitute the required evaluation of communitization, but rather, "a mere vehicle to cause the underlying lease to terminate." Woods, 47 F.3d at 1040.

The Court of Appeals' rejection of such inconsistent actions is fully supported by the Secretary's regulations. Under the regulations, the Secretary is given authority to determine whether an Indian lease is to be "subject to a cooperative or unit development plan affecting the leased lands." 25 C.F.R. § 212.24(c). A communitization agreement is the instrument by which such a plan is effectuated. However, the Secretary's decision properly goes to the propriety of communitized development (in this case in 1982), and it is not a choice between virtually identical plans of communitization.

The dissent chooses to ignore the arbitrariness of the Secretary's actions. To the contrary, the dissent suggests that no decision of the Secretary could be arbitrary or an abuse of discretion if it results in additional economic gain to the Secretary's wards. This position is based upon the discredited assertion that the important aspect of Secretarial approval is not whether communitization is proper, but whether underlying leases should continue. The dissent would, thus, turn the administrative process on its head, from an evaluation of the propriety of

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[26] Numerous courts have reached a comparable conclusion where communitization is accomplished by the ratification of voluntary unit agreements. See, e.g., Tide Water Associated Oil Co. v. Stott, 159 F.2d 174 (5th Cir. 1946), cert. denied, 331 U.S. 817, 67 S. Ct. 1306, 91 L. Ed. 1835 (1947); Hunt Oil Co. v. Moore, 656 S.W.2d 634 (Tex. Civ. App. 1983); Superior Oil Co. v. Roberts, 398 S.W.2d 276 (Tex. 1966); Budd v. Ethyl Corp., 251 Ark. 639, 474 S.W.2d 411 (1971); California Co. v. Britt, 247 Miss. 718, 154 So. 2d 144 (1963).

communitized development, to a re-review of underlying lease approval. Such unconstrained administrative conduct could well become the "monster which rules with no practical limits on its discretion." Burlington Truck Lines, 371 U.S. at 167. This suggestion is contrary to the teachings of this Court and was properly rejected by the majority of the Court of Appeals.

CONCLUSION

Based on the foregoing, Respondents, Woods Petroleum Corporation (now Argent Energy Company), Ratex Resources Incorporated, MidCon Central Exploration Company and Mustang Production Company (now Mustang Fuel Corporation), respectfully request that this Court deny the Petition for A Writ of Certiorari of Anna Twins Spottedwolf, Eleanor Stoneroad, Victor Stoneroad, Leroy Stoneroad and Tomlinson Properties, Inc.

Respectfully submitted,

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I the undersigned do hereby certify that on the 8th day of June, 1995, a true and correct copy of the above and foregoing document was forwarded by U.S. Mail, with proper postage thereon fully prepaid, to the following counsel of record:

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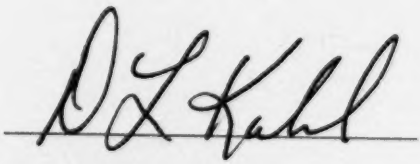

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